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Wanted: As time permits Identical to LRB:

For: Brian Burke (608) 266-8535 By/Representing: Debbie

This file may be shown to any legislator: **NO** Drafter: **malaigm**

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Subject: **Discrimination** Extra Copies:

Topic:

Public disclosure of diversity data

Instructions:

See attached

Drafting History:

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Senate Chair, Joint Committee on Finance

Memorandum

To: Gordon Malaise, Senior Attorney

From: Debbie, Senator Burke's Office

Date: 01/20/99

Re: Drafting Request – Public Disclosure of Diversity Data

As per our discussion, please draft legislation requiring corporations and state agencies to annually disclose the race, ethnic and gender composition of their workforces in a senior level management positions and corresponding pay. Corporations would be able to "opt out" of disclosing their identity to the public.

The Department of Employment Relations would compile state agency data and the Department of Workforce Development would compile corporate data and publish the information in an annual report available to the public.

If you have any concerns or suggestions, please call me at 6-8535.

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xieral : VII, violaloyer may not remove state court action to federal court, since federal court could not have exercised original jurisdiction over state court action, and since

state court action is not preempted by federal law. Pointer v Crown Cork & Seal Co. (1992, SD Tex) 791 F Supp 164, 58 BNA FEP Cas 1652.

§ 2000e-8. Investigations

(a) Access to evidence. In connection with any investigation of a charge filed under section 706 [42 USCS § 2000e-5], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title [42 USCS §§ 2000e et seq.] and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies. The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title [42 USCS §§ 2000e et seq.] and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title [42 USCS §§ 2000e et seq.]. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title [42 USCS §§ 2000e et seq.].

(c) Recordkeeping; reports. Every employer, employment agency, and labor organization subject to this title [42 USCS §§ 2000e et seq.] shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title [42 USCS §§ 2000e et seq.] or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title [42 USCS §§ 2000e et seq.] which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title [42 USCS §§ 2000e et seq.], including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected

to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

- (d) Coordination with State and Federal agencies; availability of information. In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.
- (e) Disclosure of information; penalty. It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title [42 USCS §§ 2000e et seq. involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

(July 2, 1964, P. L. 88-352, Title VII, § 709, 78 Stat. 262; March 24, 1972, P. L. 92-261, § 6, 86 Stat. 107.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Section 716(a) and (b) of Act July 2, 1964, provided: "(a) This title [42 USCS §§ 2000e et seq.] shall become effective one year after the date of its enactment [July 2, 1964].

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Equal Employment Opportunity Comm.

§§ 1602.2-1602.6 [Reserved]

Subpart B—Employer Information Report

§1602.7 Requirement for filing of report.

On or before September 30 of each year, every employer that is subject to title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1") in conformity with the directions set forth in the form and accompanying instructions. Notwithstanding the provisions of §1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII. Appropriate copies of Standard Form 100 in blank will be supplied to every employer known to the Commission to be subject to the reporting requirements, but it is the responsibility of all such employers to obtain necessary supplies of the form from the Commission or its delegate prior to the filing date.

[37 FR 9219, May 6, 1972, as amended at 56 FR 35755, July 26, 1991]

§ 1602.8 Penalty for making of willfully false statements on report.

The making of willfully false statements on Report EEO-1 is a violation of the United States Code, title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

[31 FR 2833, Feb. 17, 1966]

§ 1602.9 Commission's remedy for employer's failure to file report.

Any employer failing or refusing to file Report EEO-1 when required to do so may be compelled to file by order of a U.S. District Court, upon application of the Commission.

[31 FR 2833, Feb. 17, 1966]

§ 1602.10 Employer's exemption from reporting requirements.

If an employer claims that the preparation or filing of the report would create undue hardship, the employer may apply to the Commission for an exemption from the requirements set forth in this part, according to instruction 5. If an employer is engaged in activities for which the reporting unit criteria described in section 5 of the instructions are not readily adaptable, special reporting procedures may be required. If an employer seeks to change the date for filing its Standard Form 100 or seeks to change the period for which data are reported, an alternative reporting date or period may be permitted. In such instances, the employer should so advise the Commission by submitting to the Commission or its delegate a specific written proposal for an alternative reporting system prior to the date on which the report is due.

[56 FR 35755, July 26, 1991]

§ 1602.11 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the Employer Information Report EEO-1, about the employment practices of individual employers or groups of employers whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII or the ADA. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of title VII or section 107 of the ADA and as otherwise prescribed by law.

[31 FR 2833, Feb. 17, 1966, as amended at 56 FR 35755, July 26, 1991]

Subpart C—Recordkeeping by Employers

§ 1602.12 Records to be made or kept.

The Commission has not adopted any requirement, generally applicable to employers, that records be made or kept. It reserves the right to impose

recordkeeping requirements upon individual employers or groups of employers as subject to its jurisdiction whenever, in its judgment, such records (a) are necessary for the effective operation of the EEO-1 reporting system or of any special or supplemental reporting system as described above; or (b) are further required to accomplish the purposes of title VII or the ADA. Such record-keeping requirements will be adopted in accordance with the procedures referred to in section 709(c) of title VII, or section 107 of the ADA, and otherwise prescribed by law.

(Approved by the Office of Management and Budget under control number 3046-0040)

[31 FR 2833, Feb. 17, 1966, as amended at 46 FR 63268, Dec. 31, 1981; 56 FR 35765, July 26, 1991]

§ 1602.13 Records as to racial or ethnic identity of employees.

Employers may acquire the information necessary for completion of items 5 and 6 of Report EEO-1 either by visual surveys of the work force, or at their option, by the maintenance of post-employment records as to the identity of employees where the same is permitted by State law. In the latter case, however, the Commission recommends the maintenance of a permanent record as to the racial or ethnic identity of an individual for purpose of completing the report form only where the employer keeps such records separately from the employee's basic personnel form or other records available to those responsible for personnel decisions, e.g., as part of an automatic data processing system in the payroll department.

[31 FR 2833, Feb. 17, 1966]

§ 1602.14 Preservation of records made or kept.

Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the em-

ployer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of one year from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

(Approved by the Office of Management and Budget under control number 3046-0040)

[37 FR 9219, May 6, 1972, as amended at 46 FR 63268, Dec. 31, 1981; 56 FR 35755, July 28, 1991]

Subpart D—Apprenticeship Information Report

§ 1602.15 Requirement for filing and preserving copy of report.

On or before September 30, 1967, and annually thereafter, certain joint labor-management committees subject to title VII of the Civil Rights Act of 1964 which control apprenticeship programs shall file with the Commission, or its delegate, executed copies of Apprenticeship Information Report EEO-2 in conformity with the directions set

Equal Employmer

forth in the form : structions. The co this regulation : have five or more in the program at gust and Septem year, and (b) repre ployer sponsor ar organization spon selves subject to committee shall among the record ordinary course o the most recent r make the same a by an officer, agei Commission under tion 710 of title sibility of all suc tain from the Coi gate necessary su

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§ 1602.16 Penalty fully false stat

The making of ments on Report of the U.S. Code, and is punishable ment as set forth

[32 FR 10650, July 20,

§ 1602.17 Commis ure to file rep

Any person fail Report EEO-2 wh may be compelled U.S. District Cour the Commission, section 709(c) of ti [37 FR 9220, May 6, 1

§ 1602.18 Exempt quirements.

If it is claimed or filing of Repor undue hardship, apply to the Com tion from the req this part.

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§ 1602.19 Additio ments.

The Commissio require reports, ignated as Repo

Chapter ER 43

AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY

ER 43.05

ER 43.06

ER 43.07

ER 43.08

work:

ER 43.01	Policy
ER 43.02	Definitions
ER 43.03	Affirmative action plans
ER 43.04	Review of plans
ER 43.045	Program, policy and procedures standards

(a) Have a physical or mental impairment which makes

achievement unusually difficult or limits the capacity to

EH 43.01 Policy. It is the policy of this state to ensure equal opportunity without regard to age, race, creed or religion, color, handicap, sex, marital status, national origin or ancestry, political affiliation, arrest or conviction record, or sexual orientation. In furtherance of this policy, all persons responsible for employment decisions shall, within the scope of their assigned responsibilities:

- (1) Exercise administrative authority and personal leadership to prohibit, prevent and eradicate every form of discrimination from the agency's policies, practices and working conditions.
- (2) Take affirmative action as defined in s. 230.03 (2), Stats. For purposes of this subsection, elected state officials are not considered a similar functional group in the unclassified service.
- (3) Integrate equal opportunity and affirmative action concerns into the agency personnel management system under their control.
- (4) Develop and implement innovative personnel management procedures to aid in the achievement of affirmative action goals.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; am. (1) (3) and (4), r. and recr. (2), Register, May, 1988, No. 389, eff. 6-1-88.

ER 43.02 Definitions. In this chapter:

- (2) "Affirmative action group" means one or more of the following:
 - (a) Racial or ethnic groups.
 - (b) Gender groups.
 - (c) Handicapped groups.
- (2m) "Affirmative action program" means specific results oriented standards, procedures and initiatives designed to ensure equal employment opportunity and to eliminate present effects of past discrimination.
- (3) "AAIS" means affirmative action information system.
- (4) "Client" means any individual or organization receiving services or financial assistance from an agency.
- (5) "Equal opportunity" means the absence of discrimination in employment or in provision of services to clients.
 - (5m) "Handicapped" groups mean individuals who:

(b) Have a record of such an impairment; or

Monitoring and compliance

Availability of AAIS information

Request for information

Reporting system

(c) Are perceived as having such an impairment.

(6m) "Racial or Ethnic Groups" mean American Indians or Alaskan Natives, Asians or Pacific Islanders, Blacks, and Hispanics defined as follows:

- (a) "American Indians or Alaskan Natives" mean persons descended from any of the original peoples of North America who posses 1/4 degree of documented tribal descendancy, or are enrolled with a federally or state recognized tribe, or are recognized by a federally or state recognized tribe as American Indians for state affirmative action purposes.
- (b) "Asians or Pacific Islanders" mean persons descended from any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands.
- (c) "Blacks" mean persons descended from any of the Black racial groups of Africa.
- (d) "Hispanics" mean persons of Chicano, Mexican, Puerto Rican, Cuban, Central American or South American culture or origin, regardless of race.
- (7) "Sexual orientation" means a preference as defined in s. 111.32 (13m), Stats.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; r. (1), (2) (a) and (5), r. and recr. (2) (intro.), renum. (2) (b) to (e) and (6) to be (6m) (b), (c), (5m), (6m) (d) and (5) and am., cr. (2) (a) to (c), (2m), (6m) (intro.), (a) and (7), Register, May, 1988, No. 389, eff. 6-1-88.

- ER 43.03 Affirmative action plans. Each agency shall prepare and file with the secretary an affirmative action and equal opportunity plan which shall be developed in accordance with standards and time schedules established by the secretary and include the following minimum components:
- (1) A policy statement which affirms the commitment of the appointing authority to ensure equal opportunity, freedom from discrimination, and affirmative action in compliance with state policy and state and federal laws.
- (2) An analysis of the agency work force to determine if there are substantial disparities between the proportion of any affirmative action groups in either a classified civil service classification, grouping of classifications or similar functional group in the unclassified service, in the agency

Register, October, 1994, No. 468

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work force and the rate of that group's representation in that part of the state labor force qualified for employment in such classification, progression series or functional group in the relevant labor pool.

- (3) Goals and timetables to correct disparities identified in sub. (2).
- (4) The establishment of goals and objectives for affirmative action programs designed to achieve equal opportunity, eliminate discrimination and attain the goals and timetables identified in sub. (3).
- (5) Description of a system and timetable for regularly monitoring the effectiveness and progress of the agency in meeting the plan objectives.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; am. (intro.), (1) and (2), r. (3) to (5) and (7), a. (3) and (4), renum. (6) to be (5) and am. Register, May, 1988, No. 389, eff. 6-1-88.

- ER 43.04 Review of plans. The secretary shall review all agency affirmative action and equal opportunity plans for compliance with the standards established under s. ER 43.03. In addition the secretary shall:
- (1) Provide the governor with a list of approved or disapproved plans and notice that the plans and any comments regarding them are available for review.
- (2) Determine compliance with the standards established under s. ER 43.03 of agency plans which were previously developed to comply with federal law or to meet standards established by the board of regents of the university of Wisconsin system.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; am. (intro.), r. (1) to (6), cr. (1), renum. (7) to be (2) and am. Register, May, 1988, No. 389, eff. 6-1-88.

ER 43.045 Program, policy and procedures standards. In addition to the plans described in s. ER 43.03, the secretary may establish standards for agency affirmative action and equal opportunity programs, policies, and procedures designed to comply with state and federal affirmative action and equal employment opportunity laws and policies.

History: Cr. Register, May, 1988, No. 389, eff. 6-1-88.

ER 43.05 Monitoring and compliance. On an ongoing basis, the secretary shall monitor and evaluate each agency's progress toward affirmative action and equal opportunity goals and objectives in implementing the policy of the state and shall make specific recommendations regarding methods through which the respective agencies may improve their efforts in providing equal opportunity to employes, applicants for employment and clients of the agency. If an agency fails to make reasonable efforts to meet goals and objectives and comply with the standards established under ss. ER 43.03 and 43.045, the secretary may take necessary steps under s. 230.04, Stats., to ensure compliance.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; am. Register, May, 1988, No. 389, eff. 6-1-88.

ER 43.06 Request for information. Upon request of the secretary, the appointing authority shall provide information concerning applicants, employes and clients. Confidentiality of information shall be maintained by the secretary as provided under state and federal law.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84; am. Register, May, 1988, No. 389, eff. 6-1-88.

ER 43.07 Reporting systems. Appointing authorities shall comply with standards and procedures for reporting systems established by the secretary to acquire affirmative action information. If an agency has established reporting systems in compliance with federal law, such systems shall be reviewed by the secretary for acceptability.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84.

ER 43.08 Availability of AAIS information. Information on affirmative action groups contained in the AAIS is available to the public unless release of the information is prohibited by state or federal law.

History: Cr. Register, February, 1984, No. 338, eff. 3-1-84.



State of Misconsin 1999 - 2000 LEGISLATURE



LRB-1991/6

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AN ACT ...; relating to: an annual report of the racial or ethnic background,

gender and salary of each senior level management employe in this state.

Analysis by the Legislative Reference Bureau

Under current law, each agency of the state must furnish to the secretary of employment relations relevant racial, ethnic, gender and handicap information on every new employe hired by the agency, and the secretary must maintain the information to permit a periodic review of the agency's affirmative action plan accomplishments, that is the agency's accomplishments in ensuring equal opportunity, eliminating the present effects of past discrimination and eliminating substantial disparities between the proportion of racial, ethnic gender and handicap groups in job groups within the civil service and the proportion of those groups in the relevant labor pool.

This bill requires every employer employing one or more individuals in this state to file with the department of workforce development (DWD), and every state agency to file with the department of employment relations with an annual report disclosing the racial or ethnic background (African American, American Indian or Alaska Native, Asian or Pacific Islander, Caucasian, other than Hispanic, or Hispanic), gender and salary of each senior management level employe of the employer. DWD them must compile and analyze the information disclosed in those annual reports and publish an annual report of that compilation and analysis. The bill prohibits an employer from disclosing any personally identifiable information about an employe in filing its annual report and requires an employer that keeps any records about the racial or ethnic background of an employer separate from any records that may be used in determining the employe's qualifications for promotion, transfer or additional compensation or in determining whether to terminate or take

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other disciplinary action against the employe. At the request of any employer, other than a state agency, that wishes its identity to be kept confidential, DWD must keep confidential and may not disclose the identity of that employer.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 111.383 of the statutes is created to read:

than an agency, as defined in s. 230.03 (3), shall file an annual report with the department disclosing the racial or ethnic background, gender and salary of each senior management level employe of the employer. In filing the annual report, an employer may not disclose any personally identifiable information, as defined in s. 19.62 (5), about any employe. In disclosing the racial or ethnic background of an employe, an employer shall indicate whether the employe's background is African American, American Indian or Alaska Native, Asian or Pacific Islander, Caucasian, other than Hispanic, or Hispanic. If an employer keeps any records about the racial or ethnic background of an employe, the employer shall keep those records separate from any records that may be used in determining the employe's qualifications for promotion, transfer or additional compensation or in determining whether to discharge, terminate or take other disciplinary action against the employe.

(2) The department shall compile and analyze all information disclosed under sub. (1) and all information disclosed under s. 230.049 (1) and shall publish an annual report of that compilation and analysis. The department shall make the annual report available for public inspection and shall distribute the annual report to the legislature under s. 13.72 (2) and to the governor. At the request of any

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•	SECTION 1
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(1)	employer, other than a state agency, as defined in s. 290.09 that wishes its
2	identity to be kept confidential, the department shall keep confidential and may not
3	disclose the identity of that employer.
4	(3) The department of workforce development shall administer this section
5	according to policies and procedures established by that department in consultation
6	with the department of employment relations. Notwithstanding s. 227.10 (1), the
7	department of workforce development is not required to promulgate those policies
8	and procedures as rules. The policies and procedures established by the department
9	of workforce development under this subsection shall include policies and
10	procedures governing all of the following:
11	(a) The types of positions that are considered to be senior level management
12	positions for purposes of this section.
13	(b) The manner in which an employer may determine the racial or ethnic
14	background of an employe.
15	(c) The manner in which an employer may file the annual report under sub. (1)
16	including paper or electronic means.
17	(d) The date by which the annual reports under sub. (1) must be submitted to
18	the department.
19	SECTION 2. 230.049 of the statutes is created to read:
20	230.049 Senior management diversity reports. (1) Every agency shall file
21	an annual report with the department disclosing the racial or ethnic background

gender and salary of each senior management level employe of the agency. In filing

the annual report, an agency may not disclose any personally identifiable

information, as defined in s. 19.62 (5), about any employe. In disclosing the racial

or cthnic background of an employe, an agency shall indicate whether the employe's

(6)

background is African American, American Indian or Alaska Native, Asian or Pacific
Islander, Caucasian, other than Hispanic, or Hispanic. If an agency keeps any
records about the racial or ethnic background of an employe, the agency shall keep
those records separate from any records that may be used in determining the
employe's qualifications for promotion, transfer or additional compensation or in
determining whether to discharge, terminate or take other disciplinary action
against the employe.

- (2) The department shall deliver all information disclosed under sub. (1) to the department of workforce development for compilation, analysis and publication under s. 111.38 (2).
- (3) The department of employment relations shall administer this section according to policies and procedures established by that department in consultation with the department of workforce development. Notwithstanding s. 227.10 (1), the department of employment relations is not required to promulgate those policies and procedures as rules. The policies and procedures established by the department of employment relations under this subsection shall include policies and procedures governing all of the following:
- (a) The types of positions that are considered to be senior level management positions for purposes of this section.
- (b) The manner in which an agency may determine the racial or ethnic background of an employe.
- (c) The manner in which an agency may file the annual report under sub. (1), including paper or electronic means.

LRB-1991/? GMM....... **SECTION 2**

1 (d) The date by which the annual reports under sub. (1) must be submitted to the department.

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(END)

DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU

LRB-1991/1dn .GMM...;....

I used as a template for drafting this draft 29 CFR 1602.7 to 1602.14, which govern the employer reporting and record-keeping requirements of the federal Equal Employment Opportunities Commission. A comparison of 29 CFR 1602.7 to 1602.14 and this draft raises the following questions for your consideration:

- 1. Do you want to set a minimum number of employes that an employer must employe to trigger the reporting requirement under the draft? The EEOC threshold is 100 employes.
- 2. Do you want to specify in the draft a date certain each year by which employers must file their reports and DWD must publish the compiled report? Currently, the draft leaves that up to DWD and DER.
- 3. Do you want to specify any consequences for an employer that fails to file its report? Currently, the draft does not specify any penalty for failure to file. Therefore, the default provision, s. 939.61, stats., which provides for a \$200 forfeiture when no penalty is expressed applies.
- 4. Similarly, do you want a process by which DWD can *compel* an employer to file, for example, by applying for a court order requiring the employer to file?
- 5. Finally, do you want to permit an employer to file for a hardship exception? Because the draft only requires reporting regarding senior management employes, as opposed to all employes, the draft currently does not include a hardship exception.

Gordon M. Malaise Senior Legislative Attorney Phone: (608) 266–9738

E-mail: Gordon.Malaise@legis.state.wi.us

STATE OF WISCONSIN – **LEGISLATIVE REFERENCE BUREAU** – LEGAL SECTION (608–266–3561)

D-Note Responses Debbie 3/1/99
~ 120 oc m - cc
- 100 or more subjaved - of
- date certain? If DFI his one -no-rolling -in same
quester as incorporation i. no date certain. Let DWD determine
- consequences? DND 103.005 (12) \$10 8\$100/day -1
DFS-dissolution or revolution - too hargh - no
Plus-have report show overall statemide diversity of
company & by company preakdown



State of Misconsin 1999 - 2000 **LEGISLATURE**



1999 \mathbf{BILL}

and providing panalties

ACT to create 111.383 and 230.049 of the statutes; relating to: an annual

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report of the racial or ethnic background, gender and salary of each senior level management employe in this stata.

Analysis by the Legislative Reference Bureau

Under current law, each agency of the state must furnish to the secretary of employment relations relevant racial, ethnic, gender and handicap information on every new employe hired by the agency, and the secretary must maintain the information to permit a periodic review of the agency's affirmative action plan accomplishments, which are the agency's accomplishments in ensuring equal opportunity, eliminating the present effects of past discrimination and eliminating substantial disparities between the proportion of racial, ethnic, gender and handicap groups in job groups within the civil service and the proportion of those groups in the

relevant labor pool.

This bill requires every employer employing and or more individuals in this state to file with the department of workforce development (DWD), and every state agency to file with the department of employment relations, an annual report disclosing the racial or ethnic background (African American, American Indian or Alaska Native, Asian or Pacific Islander, Caucasian, other than Hispanic, or Hispanic), gender and salary of each senior management level employe of the employer. DWD them must compile and analyze the information disclosed in those annual reports and publish an annual report of that compilation and analysis The bill prohibits an employer from disclosing any personally identifiable information

Showing the level of ranal, ethnic and gender diversity that exists in serior management in this state both on an overall statewide basis and on an employer-by-employer basis

BILL

about an employe in filing its annual report and requires an employer that keeps any records about the racial or ethnic background of an employe to keep those records separate from any records that may be used in determining the employe's qualifications for promotion, transfer or additional compensation or in determining whether to discharge, terminate or take other disciplinary action against the employe. At the request of any employer, other than a state agency, that wishes its identity to be kept confidential, DWD must keep confidential and may not disclose the identity of that employer.

For further information see the **state and local** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 111.383 of the statutes is created to read:

111.383 Senior management diversity reports. (1) Every employer, other

than an agency, as defined in s. 230.03 (3), shall file an annual report with the department disclosing the racial or ethnic background, gender and salary of each senior management level employe of the employer. In filing the annual report, an employer may not disclose any personally identifiable information, as defined in s. 19.62 (5), about any employe. In disclosing the racial or ethnic background of an employe, an employer shall indicate whether the employe's background is African American, American Indian or Alaska Native, Asian or Pacific Islander, Caucasian, other than Hispanic, or Hispanic. If an employer keeps any records about the racial or ethnic background of an employe, the employer shall keep those records separate from any records that may be used in determining the employe's qualifications for promotion, transfer or additional compensation or in determining whether to discharge, terminate or take other disciplinary action against the employe.

(2) The department shall compile and analyze all information disclosed under sub. (1) and all information disclosed under s. 230.049 (1) and shall publish an annual report of that compilation and analysis. The department shall make the

Showing the level of racial ethnic and gender diversity that exists in senior management in this strike both on an overall statewide basis and on an employer-by-employer basis

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annual report available for public inspection and shall distribute the annual report
to the legislature under s. 13.72 (2) and to the governor. At the request of any
employer, other than an agency, as defined in s. 111.32(6)(a), that wishes its identity
to be kept confidential, the department shall keep confidential and may not disclose
the identity of that employer.
(3) The department of workforce development shall administer this section
according to policies and procedures established by that department in consultation
with the department of employment relations. Notwithstanding s. 227.10 (1), the
department of workforce development is not required to promulgate those policies
and procedures as rules. The policies and procedures established by the department
of workforce development under this subsection shall include policies and
procedures governing all of the following:
(a) The types of positions that are considered to be senior level management
positions for purposes of this section.
(b) The manner in which an employer may determine the racial or ethnic
background of an employe. (a)
(c) The manner in which an employer may file the annual report under sub. (1)
including paper or electronic means.
(d) The date by which the annual reports under sub. (1) must be submitted to
the department. Comploying 100 or more maindual's in this state Section 2 230 049 of the statutes is created to read: (a)
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BILL

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- (2) The department shall deliver all information disclosed under sub. (1) to the department of workforce development for compilation, analysis and publication under s. 111.383 (2).
- (3) The department of employment relations shall administer this section according to policies and procedures established by that department in consultation with the department of workforce development. Notwithstanding s. 227.10 (1), the department of employment relations is not required to promulgate those policies and procedures as rules. The policies and procedures established by the department of employment relations under this subsection shall include policies and procedures governing all of the following:
- (a) The types of positions that are considered to be senior level management positions for purposes of this section.
- (b) The manner in which an agency may determine the racial or ethnic background of an employe.
- (c) The manner in which an agency may file the annual report under sub. (1), including paper or electronic means.

(a)

BILL



(d) The date by which the annual reports under sub. (1) must be submitted to

2 the department.

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(END)

[Insert 2 - 14]
A(b) Any employer that fails to file an annual report
under par (a) by the date established by the department
an that files a false report
under sub. (3) (d) / may be required to forfert not less than
\$10 nor more than \$100 for each offence. Each day of
continued violation constitutes a separate offense.
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(and of nows)

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU - LEGAL SECTION (608-266-3J61)

[Insect 4-9]
agency
P(b) Any employed that fails to file an annual report
under par (a) by the date established by the department
or that Poles a folice count
under sub, (3) (d) / may be required to forfeit not less than
\$10 nor more than \$100 for each offence. Each day of
continued violation constitutes a separate offense.
(and of insert)

SUBMITTAL FÖRM

LEGISLATIVE REFERENCE BUREAU Legal Section Telephone: 266-3561 5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 3/3/99 To: Senator Burke Relating to LRB drafting number: LRB-1991 **Topic** Public disclosure of diversity data Subject(s) Discrimination in the Senate ____ or the Assembly ____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies. 2. **REDRAFT.** See the changes indicated or attached A revised draft will be submitted for your approval with changes incorporated. 3. Obtain FISCAL ESTIMATE NOW, prior to introduction If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal. If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Gordon M. Malaise, Senior Legislative Attorney Telephone: (608) 266-9738



STEPHEN R. MILLER

State of Misconsin

LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET P. O. BOX 2037 MADISON, WI 53701-2037

LEGAL SECTION: LEGAL FAX: 808) 266-3561 808) 264-8622

REFERENCE SECTION: (608) 266-0341 REFERENCE FAX: (608) 266-5648

January 18, 1999

MEMORANDUM

To:

Senator Brian Burke

From:

Gordon M. Malaise, Senior Legislative Attorney

mmg

Subject:

Constitutionality of 1999 Senate Bill 250

Debra Sybell of your office has requested a brief memorandum addressing concerns expressed at a recent public hearing that it might be unconstitutional for the state to require private sector employers to file the senior management diversity reports required under 1999 SB 250.

The brief answer to this concern is that the reporting requirement of 1999 SB 250 was based on 29 CFR 1602.7, which requires *all* employers employing 100 or more employes, not just employers contracting with the federal government, to file with the Equal Employment Opportunities Commission (EEOC) Standard Form 100, which discloses the racial and ethnic makeup of the employer's workforce. That regulation was promulgated under the federal Civil Rights Act of 1964, which provides in pertinent part that "(e)very employer . . . subject to this title shall . . . make such reports . . . as the Commission shall prescribe . . . as reasonable, necessary, or appropriate for the enforcement of this title . . . ". See 42 USC 2000e–8 (c). Thus, because 1999 SB 250 is based on 29 CFR 1602.7, which has never been struck down in the almost 30 years since its promulgation, and 42 USC 2000e–8(c), which has never been struck down in the almost 40 years since its enactment, it appears that the "reasonable, necessary and appropriate" reporting requirements of 1999 SB 250 would similarly withstand any constitutional scrutiny. In other words, if 42 USC 2000e–8 (c) and 29 CFR 1602.7 are constitutional, then 1999 SB 250 must necessarily be constitutional as well.

Similarly, any privacy concerns that the employer community might have about 1999 SB 250 are addressed by 1999 SB 250. Specifically, at first glance it might appear that the employer community's privacy concerns about 1999 SB 250 are well taken in that 42 USC 2000e–8 (e) prohibits the EEOC from making public any information obtained under 42 USC 2000e–8 prior to the institution of any enforcement proceedings, whereas 1999 SB 250 requires DWD to publish an annual report based on the information obtained from the employer's senior management diversity reports. As such, it would appear that the publication requirement of 1999 SB 250 would contradict the confidentiality requirement of 42 USC 2000e–8 (e). That is why 1999 SB 250 includes a requirement that DWD keep confidential the identity of any employer that wishes its identity to be kept confidential. Accordingly, it would appear that the bill addresses any concern that an employer might have about privacy by allowing the employer to request that the employer's identity not be disclosed.

So, it would appear that the concerns expressed at the public hearing are based more on policy grounds than legal grounds. If you have any further questions, please do not hesitate to contact me directly.